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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1464

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BLUE DIAMOND COAL COMPANY, A CORPORATION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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UMW'S REPLY TO RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

Respondent's brief (p. 2) contains its statement of Questions Presented. UMW submits that Questions Presented by UMW (Pet. 2-4) appropriately sets forth the questions involved herein.

UMW'S REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's brief (pp. 3-7),[1] charging Petitioner with inaccuracies and omissions in its statement of the case,

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[1]Page references to Respondent's opposition brief are referred to herein as "O.B." followed by a page number. Otherwise, references and abbreviations used herein are the same as were employed in footnotes 1 and 2 of the instant Petition for Writ of Certiorari.

quotes (O.B. 3-4) from the Sixth Circuit's opinion as it appears in the Appendix to the certiorari petition, at pages 10-15a, which covers six work stoppages; but Respondent *assiduously fails to tell this Court, as Petitioner recites in its certiorari petition* (Pet. 13-14; A. 16a), *that the Sixth Circuit exonerated UMW from liability for the work stoppages occurring on May 22-23, August 24, and October 1, all 1962,* declaring that "as to the two-day stoppage on May 22 and May 23, 1962, the one-half day stoppage on August 24, 1962, and the one-day stoppage on October 1, 1962, *there was not sufficient evidence from which a jury could find that they were otherwise than spontaneous stoppages, not chargeable to" UMW* (Pet. 14; A. 16a).[2] *This quotation is found in the paragraph next following the language quoted by Respondent in its opposition brief.*

Thus, in view of the Sixth Circuit's resolution of UMW's non-liability as to the three work stoppages, UMW regarded not only as unnecessary, but as irrelevant, any factual recitals concerning the noted three work stoppages.[3]

The Sixth Circuit's reference to Blair Fork Coal Company and to the statement of C. E. Beane, District 30's President, of alleged non-cooperation (A. 11-12a; O.B. 3-4) occurred in *February, 1962* and *antedated* the first of the six work stoppages, which as the Sixth Circuit's

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[2]This was consonant with the Sixth Circuit's holding that, "Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9A).

[3]The May 22-23, 1962 stoppage is discussed in the Sixth Circuit's opinion quoted on pages 3-4 of the opposition brief; discussion of the August 24, 1962 stoppage, in the Sixth Circuit's language, is found in the opposition brief at pages 5-6; and the October 1, 1962 stoppage, as quoted from the Sixth Circuit's opinion, is dealt with on page 6 of the opposition brief.

opinion recites, occurred on May 22 and 23 and followed the refusal of John Slyger, a Blue Diamond loading operator, to operate a loader without a helper on May 21 and was discharged (A. 12a); and as the Sixth Circuit further stated (A. 12a), "the men returned to work and the initial steps of the grievance procedure were taken to resolve the validity of Slyger's discharge." Indeed, under the grievance procedure, the arbitrator found Slyger's complaint to have legitimacy (T. 100-07). Neither the Sixth Circuit's opinion nor Respondent's brief herein contended there was any evidence which connected Slyger's complaint or the work stoppage with a request from Beane, or that Slyger knew of Beane's alleged statement. *Significantly, as already indicated, the Sixth Circuit rejected the jury's finding that UMW was responsible for the stoppage on May 22-23* (A. 16a). Further challenge to the alleged non-cooperation statement is the uncontradicted testimony of a *Blue Diamond* witness that numerous grievances followed the February, 1962 meeting in May, October and November, 1962, September, 1963, and February, 1964, which were settled under the grievance machinery procedures and *did not involve work stoppages* (T. 363-71).

With reference to the August 24, 1962 stoppage, it must be noted in appraising the validity of Respondent's charge of omissions and inaccuracies that, in quoting the Sixth Circuit's opinion (O. B. 6), Respondent omitted—and obviously deliberately so—the Sixth Circuit's further statement that, "While plaintiff argues that this was a way of emphasizing Perkins' 'to hell with the contract' statement of August 20, *we feel this one-half day work stoppage cannot be charged to defendant*" (A. 14a).

Similarly, with obvious deliberate calculation, in deal-

ing with the October 1, 1962 stoppage, Respondent has omitted from the Sixth Circuit's opinion (O.B. 6), the further language that, "While there was no grievance procedure invoked, *there is no evidence upon which responsibility for it could be placed on the International*" (A. 14a).

UMW submits that fairness to this Court would have compelled Respondent to have included in—and not omitted from—its quotations from the Sixth Circuit's opinion those portions wherein the Sixth Circuit *exculpated UMW from responsibility* as to the three stoppages above noted.

On the other hand, as to the work stoppages for which UMW was held liable by the Sixth Circuit, UMW's petition (pp. 14-19) dealt therewith in full detail.

To dispel completely the charge of omissions and inaccuracies, UMW invites this Court's comparison of the Sixth Circuit's recitals concerning the May 29-June 4, 1962 stoppages (found in the opposition brief, pp. 4-5) with UMW's discussion thereof in its petition (pp. 14-15), and a comparison of the Sixth Circuit's factual recitals concerning the December 3, 1962 and January 8, 1963 stoppages (found in the opposition brief, pp. 6-7) with UMW's discussion thereof in its petition (pp. 15-19). UMW submits these comparisons will demonstrate Respondent's charge of omissions and inaccuracies to be an abortive one.

UMW'S REPLY TO RESPONDENT'S ARGUMENTS

ARGUMENT 1—CONCERNING THE JURY ISSUE

Criticism of the Sixth Circuit's imprimatur of the jury's verdict is discussed in the certiorari petition (pp. 41-49). Significantly, Respondent challenges none of UMW's charged conflicts and errors.

Respondent subtly initiates its argument against this Court's granting certiorari herein by asserting disinclination by this Court's minority to grant certiorari to review evidence and discuss specific facts (O.B. 8-11). However, the sanctioned jury verdict based upon Section 301 of the Labor Management Relations Act, 1947, as amended (called "Act"), involves important phases of national labor policy, among them, the critical question of whether UMW, in its 1958 Agreement, waived its right to strike either totally or partially; whether the sanctioned verdict resulted from erroneous jury instructions; whether, in imputing liability to UMW, the Sixth Circuit's approval collides with and ignores guidelines of prior important decisions of this Court and other Federal courts; whether the Sixth Circuit's action conflicts with its own decisions; whether it is erroneous; and whether it presents a "threat to the goal of uniformity" [*Hanna* v. *Plumer, 380 U.S. 460, 463 (1965)*].

Thus, the instant certiorari petition is not one presenting baldly the issue of reviewing evidence and discussing specific facts. To the contrary, it presents important questions of significance in the *construction of Federal law,* and whether the jury function has been respected under applicable legal principles in relation to national labor policy. See the concurrence of Mr. Justice Douglas in *Wilkerson* v. *McCarthy,* 336 U.S. 53, 70-71. Award of certiorari, under a comparable situation, is found in *UMWA* v. *Gibbs,* 383 U.S. 715 (1966).

ARGUMENT 2—INSTRUCTIONS

UMW believes its certiorari petition (pp. 36-41) adequately answers Respondent's Argument 2 (O.B. 12-15), which deals with Instructions. UMW's Reason I for granting the Writ (Pet. 25-34) adequately demonstrates the

Sixth Circuit's error in approving the district court's rejection of UMW's Proffered Instructions 1 and 4, dealing with the right to strike under the 1958 Agreement.

Similarly, UMW's response to Respondent's employment (O.B. 12-13) of opinions of Senior Circuit Judge O'Sullivan and of Circuit Judges McCree and Celebrezze to justify the district court's refusal to give UMW's Proffered Instructions on "preponderance of the evidence" is found in the certiorari petition (pp. 36-39).

Respondent's claim (O.B. 13-14) that the Sixth Circuit properly approved the district court's refusal to give UMW's Proffered Instructions 2 and 3 is fully answered in the certiorari petition (pp. 39-40). These instructions would have told the jury that UMW is not liable for its members' acts merely by virtue of membership, or for spontaneous and wildcat strikes. Respondent's statement (O.B. 13) that UMW's complaint "is not that this point was not covered" in the trial court's instructions, is countered by UMW assertions in its petition (pp. 22, 39) that though Proffered Instructions 2 and 3 accorded with the Sixth Circuit's holding in *Lewis* v. *Benedict Coal Corp.*, 6 Cir., 259 F.2d 346,[4] *the given "charge contained no instruction by which the jury could have known UMW was not responsible for wildcat strikes, and the jury was never instructed as to this vital defense"* (Pet. 22), and *"Since the jury charge no where contained UMW's theory of defense, as propounded in the proffered instructions, and there was evidence supporting UMW's theory, the Sixth Circuit's*

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[4]Indeed, in the instant action, as already noted (fn. 2, p. 2), the Sixth Circuit herein held that "Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9a).

approval of the district court's rejection conflicts" with cases cited in the certiorari petition (pp. 39-40).

Answer to Respondent's efforts (O.B. 14-15) to justify the trial court's rejection of UMW's Proffered Instruction 8 on damages, and the Sixth Circuit's approval of such rejection, is found in the certiorari petition (pp. 40-41).

ARGUMENT 3—UMW'S CONTRACTUAL RIGHT TO STRIKE

Answers to Respondent's arguments concerning UMW's contractual right to strike appear in its certiorari petition (pp. 25-36). Additionally, UMW submits the following:

A. A Court Majority Has Never Approved the Sixth Circuit's Benedict Holding on UMW's Contractual Right to Strike.

In appraising Respondent's argument that certiorari should not be granted "to reconsider the now well-established rule that a strike to resolve a dispute made arbitrable by a contract, is a breach of that contract", it is to be remembered that while the Sixth Circuit's *Benedict* (259 F.2d 346) was affirmed, affirmance was, as Respondent states (O.B. 15), "upon an equally divided Court" [*Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960)] —purely a technical affirmance. The Sixth Circuit's *Benedict* has never received affirmance by a majority of this Court.

B. This Court's Equal Division in Benedict Was Limited to the 1950 Agreement.

Actually, this Court's affirmance related only to the National Bituminous Coal Wage Agreement of 1950, since as the certiorari petition (p. 10, fn. 7) shows, this Court limited review to the 1950 Agreement. In any event, interpretation of the *1952 Agreement* was not an

issue for this Court's consideration when validity of the Sixth Circuit's *Benedict* was before it (361 U.S. 459). Thus, Respondent's claim (O.B. 18) that *Benedict* involved the *1952 Agreement* is clearly inaccurate so far as this Court's affirmance of *Benedict* is concerned.

C. The Instant Case Concerns the 1952 and 1958 Agreements.

As UMW's certiorari petition emphasizes, the 1950 Agreement was changed through the process of collective bargaining. Like the 1950 Agreement, the 1952 and 1958 Agreements preserved the deletion and repeal of the "no strike" and related clauses in earlier collective bargaining agreements (Pet. 9-10). In addition, whereas the 1950 Agreement expressly provided that all *"stoppages"* shall be settled *"exclusively"* by the Agreement's machinery for settling disputes, the 1952 and 1958 Agreements *omitted* the words *"stoppages"* and *"exclusively"* and provided merely that "all disputes and claims" not settled by agreement were to be settled by such machinery (Pet. 27-29). The Sixth Circuit ignored the Agreements' omission of the word "stoppages" and did not consider as meangful elimination of the term "exclusively" in the 1952 and 1958 Agreements (A. 6a).

Inaccurate is Respondent's claim (O.B. 18) that UMW conceded (Pet. 31) the instant case involves the same wage agreement with which *Benedict* was concerned. Examination of UMW's statement discloses it pertained to the *1952 Agreement,* and its concession was that the *1958 Agreement* contained the identical provisions as the *1952 Agreement,* which, as the certiorari petition (p. 31) recites, was interpreted as not containing a no-strike clause by the District of Columbia Circuit in *Int. Union, UMWA* v. *NLRB,* 257 F.2d 211.

D. Respondent Fails to Show that the Sixth Circuit Holding Accords With National Labor Policy As Mandated by Congress and As Interpreted By This and Other Federal Courts and the NLRB.

Thus, the District of Columbia Circuit's holding not only challenges Respondent's characterization of the Sixth Circuit's *Benedict* (259 F.2d 346) as "the now well-established rule" (O.B. 15), *it emphasizes the current conflict with the Sixth Circuit's holding in the instant case.* Consonant with the District of Columbia Circuit's holding, *but in conflict with the Sixth Circuit's holding,* is the Third Circuit's assertion that UMW's collective bargaining agreement "did not contain a 'no-strike' provision" in *United States Steel Corporation* v. *UMWA, et al,* 3 Cir., 74 LRRM 2611, 2612 (June 30, 1970).

Inappositeness of *Teamsters* v. *Lucas Flour Co.,* 369 U. S. 95, relied upon by Respondent (O.B. 16), is demonstrated in the certiorari petition (p. 33). Additionally, the dissenting opinion therein stated the contract specifically provided agreement by both parties "that *during such arbitration, there shall be no suspension of work*" (369 U.S. 107)[5]. *Lucas Flour* must be interpreted in light of that specific contractual provision, as well as *Lucas Flour's* adoption (p. 105) of NLRB's doctrine in *W. L. Mead, Inc.,* 113 NLRB 1040, wherein "*the contract contained no explicit no-strike clause*" (p. 1042). UMW submits it is one situation when a bargaining agreement contains "no explicit no-strike clause"; but it is a totally different situation for contracting parties to a bargaining agreement, as in the instant case, to agree that previous no-strike or related clauses "are hereby rescinded,

[5]UMW's 1941 Agreement provided that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute"; but the 1958 Agreement expressly rescinded that clause and related clauses (Pet. 6-10).

cancelled, abrogated and made null and void" (Pet. 8). *Lucas Flour* proclaims the necessity of adherence "to accepted principles of traditional contract law" (p. 105). Implementation of that principle demonstrates the Sixth Circuit's conclusion emasculates the parties' agreement, contrary to this Court's holding that plain provisions of a valid contract may not be ignored. *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363. (See Pet. 29-30).

Respondent's reliance (O.B. 16-17) upon *The Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 26 L. ed. 2d 199 (1970) is abortive. *Boys Markets* made clear its adherence to the dissent in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, which conceded that therein the unions had agreed that "[T]*here shall be no strikes . . . for any cause which is or may be the subject of a grievance*" (370 U.S. 228), and thus adoption in *Boys Markets* of *Sinclair's* dissent must be read in *pari materia* with the conceded fact that *Sinclair* contained an unquestionable no-strike clause on the union's part which, as already noted (*ante*, p. 9), differs from the instant situation.

Respondent's effort (O.B. 17) to render *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, inapplicable is without merit. If, as *Boys Markets* professes (26 L. ed 2d 210), "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to... §301(a)... and the purposes of arbitration", by like token similar accommodation must be accorded to the Act's Section 13, wherein Congress commanded that, "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike", and, as *Lion Oil* holds (352 U.S. 293): "Where there has been no express waiver of the right to strike,

a waiver of the right during such a period is not to be inferred." Thus, *Lion Oil's* applicability is not only manifest and real, but it accords with this Court's holding in *NLRB* v. *Drivers Local Union,* 362 U.S. 274 (1960) that Section 13 is a rule of construction which cautions against an expansive reading thereof "which would adversely affect the right to strike" and "is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike . . ." (362 U.S. 282).

Respondent's attempts to distinguish the instant situation from *Garmeada Coal Co.* v. *Int. Union, UMWA,* 6 Cir., 230 F. 2d 945—discussed in the certiorari petition (p. 33)—by pointing to differences in results in the two cases (O.B. 17-18) is no answer to Petitioner's pointing out that the district court in *Garameada* reasoned that miners were *"pursuing their right to strike regardless of the provisions of the" 1950 Agreement,* which the Sixth Circuit affirmed.[6]

In its certiorari petition (p. 25 et seq.) UMW asserts the Sixth Circuit's holding as to the right to strike to conflict with national labor policy as expressed by Congress and with prior decisions of the federal judiciary and the NLRB. UMW's foregoing answers to Respondent's arguments (O. B. 15) abundantly demonstrate its failure to challenge UMW's contentions.

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[6]*Garmeada Coal Co.* v. *Int. Union, UMWA,* DC, E.D. Ky., 1954, 122 F. Supp. 512, 518.

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, Petitioner prays that the Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit entered in Case No. 19,589. Petitioner intends to urge each of the points and questions presented, though not specificially argued in said petition or herein.

Respectfully submitted,

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